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The Dilemma of Adoptees in the Class Gift Structure--The Kentucky Approach: A Rule Without Reason

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THE DILEMMA OF ADOPTEES IN THE CLASS GIFT STRUCTURE—THE KENTUCKY APPROACH: A RULE WITHOUT REASON

I. INTRODUCTION

Adoption is one of the oldest and most widely employed of legal fictions[1] that establishes the legal relationship of parent and child between persons not so related by blood.[2] While somewhat of a rarity within the United States fifty years ago, today adoption has become an accepted part of American culture[3] and has developed into a highly sophisticated social tool which is being utilized with increasing frequency. The importance of adoption as an institution becomes readily apparent when examined in light of both the number of children adopted each year and the amount of revenue expended annually by governmental units in support of child welfare services.[4] Unfortunately, while the number of adoptions has steadily risen over the last four decades statutes pertaining to the inheritance rights of adopted persons have been unable to keep pace with the changing social fabric.

The modern approach to adoption is to sever all ties between the adoptee and his natural parents and to transplant the child into his adoptive family with all the rights of a natural child.[5] Such statutory schemes deny the natural parents any rights in relation to the child's estate and at the same time extinguish the child's claim to the estate of his natural parents. A majority of jurisdictions specify that the adoptive child may inherit from his adopted parents, and where the right to

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[1] *See* Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956).

[2] R. PETRILLI, KENTUCKY FAMILY LAW § 29.6 (1969).

[3] Polier, *Parental Rights: The Need for Law and Social Action*, reprinted in F. HARPER, PROBLEMS OF THE FAMILY [hereinafter PROBLEMS OF THE FAMILY] 204 (2962).

[4] Recent statistical evidence reveals a substantial increase in the number of adoptions over the last few years. In 1964 for example, official U.S. government figures indicate that over 135,000 children were adopted in the United States. This total represented a 6.4 percent increase over the preceding year. Of this figure 53 percent or 71,600 children were adopted by non-relatives. In Kentucky alone over 1,500 adoptions were reported in the year 1964.

Like the ever increasing number of adoptions, so too has the the cost of providing child welfare services skyrocketed. In the ten-year period from 1956 to 1965, state and local government expenditures for the support of child welfare agencies nearly tripled. Since 1936, federal grants-in-aid to states for child welfare services has grown from a mere 625,000 dollars to a figure of over 34 million dollars. U.S. DEPT. OF HEALTH & WELFARE ADMINISTRATION CHILDREN'S BUREAU, CHILD WELFARE STATISTICS No. 84 (1966).

[5] PROBLEMS OF THE FAMILY, *supra* note 3, at 214.

inherit is not so provided the courts have interpreted the statutes so as to bring the adoptee into the line of inheritance.[6] However, even in jurisdictions in which the parent-child relationship is created between children and their adoptive parents, courts have been reluctant to recognize the right of an adopted child to inherit through as well as from its adoptive parents (*i.e.*, the courts permit the adopted child to inherit from the adopting parent but are not generally willing to allow the adopted child to inherit from the relatives of the adopting parent) absent clear statutory language.[7] The theory is that the personal relationship created between the adoptive parents and the child does not automatically create the same legal status between the child and the relatives of the adoptive parents.[8] As a result, while the adopted child is generally permitted to inherit by intestacy from his adoptive parents, the other ramifications of the effect of adoption on inheritance have remained for the most part unresolved by the courts and ignored by our statutes.[9]

One such problem area, and the one with which we are here primarily concerned involves the status of the adopted child under a will, trust or other document. These questions are more frequently litigated and involve, in most instances, a greater amount of wealth. A typical situation may be illustrated by assuming that *X*, by will or trust, conveys Blackacre to *Y* for life, remainder over at *X's* death to *X's* "children," "issue," "heirs," or "descendants." *X* adopts a child and the issue is whether the adoptee, on *X's* death takes under the class gift. Questions of this sort depend upon *X's* intent rather than on the application of the local statutes of descent and distribution, although such statutes may have some bearing on *X's* intent since they express the state's public policy. Of course, there are many factual and policy considerations upon which any given case may ultimately turn such as the terminology employed, the age of the person adopted, whether or not the transferor had knowledge of the adoption and many more to be later examined. It is the purpose of this note to review the inheritance rights of adoptive persons under class gifts in general, with specific emphasis upon their legal status in Kentucky and to suggest a specific course of reform in areas where it is sorely needed.

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[6] *Id.* at 215.

[7] *In re* Estate of Smith, 326 P.2d 400 (Utah 1958); Gamble v. Cloud, 82 So.2d 526 (Ala. 1955); *In re* Will of Hodge, 60 N.E.2d 540 (N.Y. 1945).

[8] *See* Merritt v. Morton, 136 S.W. 133 (Ky. 1911); *In re* Hayes' Estate, 86 P.2d 424 (Ore. 1939).

[9] A. GULLIVER, E. CLARK, L. LUSKY, & A. MURPHY, CASES & MATERIALS ON GRATUITOUS TRANSFERS 83 (1967).

II. BACKGROUND

Adoption was a common practice among the ancient Babylonians,[10] Greeks and Egyptians[11] and was apparently utilized at an early date by the Indian tribes on this continent.[12] At Roman law, which is the unquestioned source of our modern adoption statutes, the practice was employed solely for the benefit of the adoptive family and was designed to avoid not only the extinction of the family name but also to perpetuate the rites of family religious worship.[13] Adoption under the Romans developed into two distinct forms known as adrogation and adoption. Adrogation was the adoption of an adult who was sui generis and independent and was accomplished by a special act of the Patrician assembly.[14] Adoption, on the other hand, was the legal act whereby a person who was the head of the family relinquished his position as father over a child to another.[15] The process of adoption did not require a formal legislative act but merely consisted of the appearance of all parties concerned before a magistrate.[16]

By the time of Justinian, Roman law evolved into a sophisticated code which prohibited individuals from adopting others if they had living issue or were capable of producing offspring.[17] Once adopted, however, the adoptee became a member of his adoptive family and broke all ties with his natural parents.[18] He took the name of the adoptor and became legally entitled to inherit from him while retaining his right of succession in his own natural family.[19] Today, much of the old Roman adoption laws remain preserved in the modern statutes of the civil law countries of Europe.

In England where the Roman impact was less significant, the practice of adoption was unknown and common law development literally ignored it.[20] Hence, the act of adoption throughout the British

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[10] The Code of Hammurabi which dates from 2285 states in part that, "If a man takes a child in his name, adopt and rear him as a son, this grown-up son may not be demanded back; if a man adopt a child as his son, and after he has taken him he trnsgress against his foster-father, that adopted son shall return to the house of his own father." *See* A. KOCOURCK & J. WIGMORE, EVOLUTION OF LAW, SOURCES OF ANCIENT AND PRIMITIVE LAW [hereinafter KOCOURCK & WIGMORE].

[11] Note, *The Law of Adoption*, 22 COLUM. L. REV. 332, 333 (1922).

[12] *See* Comment, 29 KY. L. J. 481 (1940-41).

[13] *See* 22 COLUM. L. REV. *supra* note 11, at 332.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] KOCOURCK & WIGMORE, *supra* note 10, at 345.

[18] *Id.* at 346.

[19] *See* 22 COLUM. L. REV. *supra* note 11, at 334.

[20] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 399 (2d ed. 1911).

Commonwealth and in the United States is regulated entirely by statute.[21] This is not to say that adoption was non-existent in England, as the rearing of foster children was not at all uncommon. The relationship was treated as if the children were the natural issue of the foster parents, but they received no separate legal recognition and so were not entitled to inherit from their adoptive parents.[22] To the English courts the term "heirs" was construed to mean only legitimate children who were heirs of the blood.[23]

The precedent established by the English judiciary was consistently followed by American courts long after this country's separation from Great Britain. As a consequence, adoption as we know it was not permitted in the United States until Mississippi enacted the first statute on the subject in 1846[24] followed closely by Massachusetts in 1851.[25] Early legislative attempts, however, tended to emphasize only the necessary qualifications for adoption and the procedures which had to be followed in order for the adoption to become effective.[26] Since the tendency of the courts was to favor blood relatives over adoptees, the neglect on the part of early state legislators to precisely define the status of adopted children in relation to their new families resulted in many adoptees being excluded from the right to inherit. This initial preoccupation with procedural requirements was probably due to questions of inheritance being considered of secondary importance to the humanitarian objective of providing for the welfare of adopted children.[27] Whatever the reasoning embodied in the early statutes, its vestiges remain in modern adoption legislation. Insofar as coming to grips with the problem of allowing adopted children to inherit through as well as from their adoptive parents, most state legislatures have not spoken clearly and absent express statutory provision, the courts have been reluctant to permit it.[28] While the trend of modern legislation is in the direction of permitting adoptees to inherit through as well as from their adoptive parents it may well take many years before this practice and others more in tune with

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[21] The first English statute on adoption was enacted in 1926. Adoption of Children's Act, 16 & 17, Geo. 5, c. 29 (1926).

[22] Huard, *supra* note 1, at 746.

[23] *Id.* at 745, 746.

[24] *Id.* at 748. Both Louisiana and Texas preceded Mississippi in point of time but were governed under the civil law which remained as a vestige of French and Spanish rule. *Id.*

[25] MASS. GEN. LAWS ch. 324 (1851).

[26] *See* KY. STAT. § 2071 (1892) which is typical of early adoption statutes.

[27] Early American statutes departed from the basic concepts of Roman law in that the primary concern under state laws was for the welfare of the child. Huard, *supra* note 1, at 749.

[28] *Cf.* PROBLEMS OF THE FAMILY, *supra* note 3, at 215.

modern social concepts are accepted widely. In the meantime the burden of dealing with the multiplicity of issues raised by adoption rests squarely upon the shoulders of the courts.

III. RULES OF CONSTRUCTION APPLICABLE TO CLASS GIFTS

A. In General

In attempting to determine the meaning of language in private instruments the intent of the transferor is of primary importance.[29] Indeed the sole function of the court is to discover and give effect to the transferor's intent as expressed in the document.[30] Thus, where the intention of the transferor to include or exclude adopted children is manifested in the instrument the court will uphold it and will not resort to rules of construction.[31] Of course, it is not always possible to ascertain the transferor's intent by merely reading the instrument. In these situations the court must place itself in the shoes of the transferor so as to determine the intention inferred from the language or testamentary scheme, interpreted in light of the surrounding facts and circumstances and other extrinsic evidence.[32] In most cases involving the inheritance rights of adoptive children, however, it is reasonable to assume that the testator had no actual intent to either include or exclude the adoptee. If such an intent had been present at the time the instrument was drafted or executed the testator's predisposition would most certainly have been expressed in more explicit terminology. On occasion such latent ambiguities can be resolved by resorting to extrinsic evidence which reveals a specific intention on the part of the testator.[33] In most cases, however, there are few persuasive clues as to what the transferor would desire and the court must therefore rely on the applicable rules of construction. While some rules of construction are based largely upon what it is thought that the typical testator would intend, other such rules have their basis primarily in some general policy which is fostered by the law.[34] Thus, it is obvious that in many cases effect is likely to be given to a meaning that was probably never in the testator's mind. Nevertheless, courts cannot realistically be expected to perform the impossible task of

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[29] Prewitt v. Prewitt's Ex'rs., 199 S.W.2d 435 (Ky. 1945).

[30] Davidson v. Davidson, 117 N.E.2d 769 (Ill. 1954).

[31] *Cf.* T. ATKINSON, HANDBOOK ON THE LAW OF WILLS [hereinafter ATKINSON] § 146 (2d ed. 1953).

[32] *See generally* 4 PAGE ON THE LAW OF WILLS [hereinafter LAW OF WILLS] §§ 30.6 -.10 (Bowe-Parker Rev. ed. 1961).

[33] *In re* Ward's Will, 195 N.Y.S.2d 933 (N.Y. App. Div. 1959), *aff'd*, 174 N.E.2d 326 (N.Y. 1961).

[34] *Cf.* ATKINSON, *supra* note 31, at § 146.

reading the decedent's mind and must of necessity look to specific rules of construction which have been developed in the course of certain recurring fact situations. The resulting "intent" which is determined by the court and attributed to the testator is in essence a combination of both judicially envisioned social desirability and conjecture as to what the testator probably would have intended had he thought about the matter.[35] The outcome of any given case depends upon a number of interplaying factors which vary in weight depending upon the circumstances.[36] Was the testator the adopter of the child? When did the adoption take place in relation to the execution of the instrument? Was the testator aware of the adoption and was he aware of the probable legal consequences of class designation in relation to the adoptee? Thus, the present law is most readily understood by an examination of the various rules of construction governing the rights of adoptees under various fact situations, as defined in terms of recurring combinations of language and circumstances.

B. Effects of Statutes

As might be anticipated, certain statutory provisions pervade the entire subject of inheritance rights of adoptees. The statutes of primary importance are those pertaining to the act of adoption and its legal consequences and the applicable statutes of descent and distribution. The statutes of descent and distribution are of importance to the extent that some general public policy contained therein may provide the basis for a presumption or an inference in determining the intention to be attributed to the testator whose actual intent, if any, is not known.[37] As to the actual adoption statutes themselves, they may serve to define the status created by the act of adoption and are therefore relevant to any inquiry as to the recognized relationship between the adoptee and his adoptive family.

It has been suggested by at least one commentator that adoption statutes affect the construction of private instruments in at least three ways.[38] First, the statute by its very terms may more or less prescribe the effect which adoption will have with respect to identification under particular designations in private instruments. For example, the statute may provide that the word "child" or its equivalent in any instrument shall include an adopted child unless the contrary plainly

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[35] Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 705, 708-09 (1945).

[36] *Id.*

[37] *Cf.* 5 A. CASNER, AMERICAN LAW OF PROPERTY [hereinafter LAW OF PROPERTY] § 22.57 (1952).

[38] Oler, *supra* note 35, at 709-10.

appears by the terms of the instrument. At present, the legislatures in Pennsylvania[39] and several other states[40] have enacted statutes which deal specifically with the rights of adoptees to inherit under class gifts. The Pennsylvania act provides that:

> Whenever in a will a bequest or devise shall be made to the child or children of any person other than the testator without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person who were adopted before the date of the will, unless a contrary intention shall appear by the will.

Second, by investing an adoptee with a particular status and nothing more, such as that of an "heir" of the adopting parents, the statute may, when viewed in conjunction with the principle of construction—whereby words are normally construed according to their plain meaning—have an exclusionary effect in that the adoptee is not within the designation employed in the will. For instance, if the adoptee is designated as an "heir" in the statute but the relationship of parent and child is not otherwise created, the statute exerts a negative force which excludes the adoptee from taking under a gift to the children of the adopter.

Third, the statute may have an inclusionary effect where the particular status of "child" of the adopter is created. Thus, if the statute creates a parent-child relationship and invests the adoptee with all the rights of a child born in lawful wedlock, it will be given due weight by the courts in determining whether or not the adoptee should be permitted to take under a gift to the adopter's "children." If no surrounding circumstances exist which reveal the testator's actual predisposition, a court might well consider the statute to supply testator's actual intent. At this point it may be well to remember that the vast majority of courts still favor blood relatives over adoptees[41] and that where the statutes are not explicit, adoptees will usually not be permitted to inherit.[42]

C. Resort To Language and Circumstances

In the typical situation where the question is whether an adopted child is included by reference in a will to *X's* "children," "issue," "heirs"

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39 PURDON'S PENNA. STAT. ANN. tit. 20, ch. 2, § 228 (1957).

40 *See e.g.* CONN. GEN. STAT. ANN. tit. 45 Ch.778 § 45-65a (1960); GA. CODE ANN. tit. 45 § 74-414 (1964); ILL. REV. STAT. ch. 3, § 14 (1961).

41 *Cf.* RESTATEMENT OF PROPERTY § 265, comment (d), at 287 (1940).

42 The continued reluctance of the courts to interpret adoption statutes more broadly so as to include adoptees within gifts to classes such as "children" etc. is probably due to the old maxim that statutes in derogation of the common law are to be given a narrow construction.

or other relations, the language employed may in itself be sufficiently clear to decide the question. There is a presumption that nontechnical words which are used in a will are used in their usual popular meaning and technical terms are used in their technical sense.[43] If in the popular or technical meaning of the word there is a connotation of blood relationship, the term itself will be persuasive against inclusion of an adoptee within it. On the other hand, if the term which designates the class has acquired a statutory significance independent of implications of consanguinity, it can operate in favor of including an adoptee within the designation. An example of a frequently employed word which has acquired an independent statutory significance is the term "heirs" which depends upon the law of intestate succession for its definition. In large measure of course the entire matter is one of definition and as such is subject to the tyranny of the definer.

1. Gifts to Children

The most common type of gift to a class is one where the transferees are described as the "children" of some designated person.[44] As a general rule, if the transferor is the parent of an adopted child, a devise or bequest to the transferor's own "children," "issue," "heir" etc. will be held to include the adoptee.[45] In this situation inclusion of the adoptee within the class seems justified since most persons who would have enough affection for a child to adopt it as their own would probably intend that it should be included in a reference to their children.[46] An exception to the general rule has been recognized, however, when the adopter is also the natural grandparent of the adopted child. In such cases the problem which arises is the possibility that the adoptee will receive double shares. Here, courts have usually taken the position that the child may receive only his share as a grandchild.[47] Another situation in which the rights of a testator's adopted child are in doubt is when the adoption takes place between the time the instrument was executed and the testator's death. While the law is not completely clear in this area, courts have generally been favorable toward including the adopted child within the class gift,[48] notwithstanding the fact that it can no longer be argued that

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[43] 4 LAW OF WILLS, *supra* note 32, at § 30.21.
[44] 5 LAW OF PROPERTY, *supra* note 37, at § 22.30.
[45] *See e.g. In re* Barbarita's Trust 190 N.Y.S.2d 584 (N.Y. Sup. Ct. 1959); Virgin v. Marwick, 55 A. 520 (Me. 1903); BERGIN & HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 234 (1966).
[46] *Cf.* Wildman's Appeal, 151 A. 265 (Conn. 1930).
[47] Einstein v. Michaelson, 177 N.Y.S. 474 (N.Y. Sup. Ct. 1919).
[48] *E.g.*, Young v. Stearns, 125 N.E. 697 (Mass. 1920).

the testator must have had the child in mind when he executed the will.

When the testator is not the adopting parent, however, there is a presumption against the inclusion of the adopted child within the primary meaning of the word "children."[49] This so-called "stranger-to-the-adoption" doctrine[50] may be illustrated by a disposition "to *X* for life, remainder to the children of *X*". The issue of course is whether a child adopted by *X* qualifies as one of the children of *X*. The result depends upon the intention of the testator but, since he probably had no intention either to include or exclude the adoptee, the intention which the law will attribute to him is of primary importance. At present, courts tend to believe that when a "stranger-to-the-adoption" makes a bequest or devise to the "children" of another, he only had in mind the lawful children of the body of the person designated.[51] On the other hand, adopted children are presumptively included where the testator knew that the parent had adopted a child when the instrument was executed.[52]

2. Gifts to Issue and Descendants

Under the early English common law a testamentary gift to "issue" was construed to mean that all legitimate lineal descendants of every degree took per capita.[53] This construction of course precluded adopted children from taking as they were not recognized at common law for inheritance purposes. The modern trend in American law, however, is to limit those who would inherit under the term "issue" to those who would take as such under the applicable statute of descent and distribution.[54] While such a construction would presumably permit adopted children to come within the designated class of "Issue" in states where the statutes treat adopted persons as the natural children of the adopter for all purposes, this is not always the case. The words "issue" and "children" are not synonymous and a statute which raises the adoptee to the status of "natural child" does not make the adoptee "issue" or a "descendant."[55] As one court

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[49] 5 LAW OF PROPERTY, *supra* note 37, at § 22.34.

[50] This doctrine provides that a limitation in a deed or will to a "child" or "children" is not deemed to include an adopted child where the grantor or testator is a stranger to the adoption. Ahlemeyer v. Miller, 131 A. 54, 56 (N.J. Sup. Ct. 1925).

[51] *Cf.* 5 LAW OF PROPERTY, *supra* note 37, at § 22.34.

[52] L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 105 (1966).

[53] *Id.*

[54] *Id.*

[55] *But see* Washington's adoption statute which provides expressly that an adoptee shall be deemed to be the "issue" of the adopter. WASH. REV. CODE tit. 26, § 26.32.140 (1955).

put it, "There is no such person as issue by adoption."[56] It has also been held that although the statute makes the adoptee the child of the adopter, it does not make him a descendant.[57] The reasoning behind this construction is that etymologically the word "issue" tends to imply a physical springing from the ancestor and not from an adoption.[58] The term "descendants" has also been construed to connote a blood relationship to the exclusion of adoptees.[59]

The more logical position and the one taken by most courts is that where a statute creates a parent-child relationship between the adopter and adoptee, the latter is by virtue of the statute presumptively within the designation of the adopter's "issue" or "descendants" unless the context or circumstances establish a contrary intention.[60]

3. Gifts to Heirs and Next of Kin

Unlike the construction given to class gifts under the designation of "children", "issue", or "descendants" when the transferor is a "stranger-to-the-adoption", courts generally permit adoptees to take under gifts to the adopting parent's "heirs" or "next-of-kin." The rationale behind this difference in treatment of the terms "heirs" or "next of kin" is that they are regarded as having a prima facie reference to those who take under the applicable laws of descent and distribution.[61] For example, if *A* devises property to his brother, *B*, for life, remainder "to the heirs of *B*", *B*'s adopted children will share in the remainder interest because under the laws of intestacy in all states,[62] he is an heir of *B*, whose heirs are designated. If, on the other hand, the transferor had designated his own "heirs" or his own "next of kin" the right of the adopted children of another person to share in the gift is by no means certain. For instance, assume that *A* conveyed property in trust for himself for life, remainder to "my [*A*'s] heirs". If upon *A*'s death he left no descendants, the adopted children of *A*'s deceased brother would be excluded in a number of states even though the natural children of the brother would take as *A*'s

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[56] *In re* Cuddeback's Will, 20 N.Y.S.2d 862 (N.Y. 1940).

[57] Hale v. Hale, 237 Ill. App. 410 (1925).

[58] *See* Dulfon v. Keasbey, 162 A. 102 (N.J. 1932); Miller v. Wick, 142 N.E. 490 (Ill. 1924).

[59] *In re* Dudley's Estate, 6 N.Y.S.2d 489 (N.Y. 1938).

[60] *In re* Holden's Trust, 291 N.W. 104 (Minn. 1940); *In re* Truman, 61 A. 598 (R.I. 1905).

[61] *E.g.*, Bedinger v. Graybill's Ex'r, 302 S.W.2d 594 (Ky. 1957); Dickenson v. Buck, 192 S.E. 748 (Va. 1937). *See also* Casner, *Construction of Gifts to Heirs and the Like*, 53 HARV. L. REV. 207, 208-09.

[62] Note, *Property Rights as Affected by Adoption*, 25 BROOKLYN L. REV. 231, 242-46 (1959).

heirs.[63] In these situations the case may depend on whether or not the brother's adopted children would be eligible to take A's intestate property, which in turn depends upon whether adoptees take through as well as from their adopting parents under the applicable statute. These cases, however, are not necessarily controlled by the laws of intestate succession even where the instrument refers to the "heirs" of the adoptive parent. This is because these questions are governed by the testator's intention and may occassionally result in the conclusion that "heirs" was used by the particular testator to mean "children" and that the exclusionary rule applicable to that term should apply.[64] Usually, however, the courts which reach this result have done so by not treating this language as referring to the statutes of descent and distribution, so that the general exclusionary presumption applies.[65]

IV. RIGHTS OF MINOR ADOPTEES IN KENTUCKY

The status of adoptive children under class gifts in Kentucky is, at present, not entirely certain. The reasons for the existing uncertainties are several and include among others the marked effect of judicial decisions regarding the rights of adoptees under the statute of descent and distribution and the overwhelming influence of the statute which defines the legal status of adoptive children.

The current statute, KENTUCKY REVISED STATUTES [hereinafter KRS] §199.530(2), *as amended* in 1956, defines the status of adoptive children as follows:

> From and after the date of the judgment the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural, legitimate child of the parents adopting it the same as if born of their bodies. Except where a natural parent is the spouse of an adopted parent an adopted child from the time of adoption shall have no legal relationship to its birth parents in respect to either personal or property rights.[66]

Under Kentucky's 1940 statute[67] and two subsequent amendments[68]

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[63] *See e.g., In re* Estate of Slavens, 149 N.Y.S.2d 73 (N.Y. Surr. Ct. 1956); Brown v. Wright, 80 N.E. 612 (Mass. 1907).

[64] Everitt v. LaSpeyre, 24 S.E.2d 381 (Ga. 1943); Cook v. Underwood, 228 N.W. 629 (Iowa 1930).

[65] *E.g.*, Old Colony Trust Co. v. Wood, 74 N.E.2d 141 (Mass. 1947); *In re* Estate of Clarke, 251 N.W. 279 (Neb. 1933).

[66] KY. REV. STAT. § 199.520(2) (1956) [hereinafter cited as KRS].

[67] KRS § 405.200 (1940).

[68] In both 1946 and 1950 the statute was renumbered, *i.e.* KRS § 405.340 (1946), and KRS § 199.530(2) (1950).

thereto, the Court of Appeals interpreted language substantially similar to that contained in the existing act to allow an adopted child to inherit through as well as from his adoptive parents[69] and dicta in at least two decisions rendered since the 1956 amendments lend persuasive support to the conclusion that an identical construction would be given to the existing law.[70] With respect to the right of an adoptee to take as a beneficiary under class gifts, however, a good deal more confusion arises. Whether or not an adoptee will be included depends primarily upon the terminology employed to designate the class and the intent the court will attribute to the testator.[71] In recent years adoptive children have been held to be presumptively included within the designations "children", "heirs", "heirs at law" and "legal heirs"[72] though controversial holdings in several recent cases[73] have raised some uncertainty as to what age group is to be permitted to take under the term "children". In order to gain an adequate understanding of the present law as it pertains to the inheritance rights of adoptive children under class gifts in Kentucky, however, it is imperative that the applicable case law and the statutory structure upon which it rests be subjected to analysis in a historical context.

While acknowledging at an early date that such terms as "children", "issue", and "kindred" were not necessarily confined to those born in lawful wedlock or related by blood,[74] the Court of Appeals consistently refused to permit an adoptee to inherit through as well as from his adoptive parents. The Court's views were perhaps most clearly spelled out in the case of *Merritt v. Morton*.[75] In that case W. W. Merritt and his wife entered into a contract of adoption with the Louisville Baptist Orphan's Home whereby they adopted an infant son. After the execution of the contract Merritt and his wife reared the child until he reached the age of majority. At sometime prior to 1910 the adoptee's foster mother died, followed closely in death by her own mother, Sarah Morton, who died intestate. The adoptee asserted that he was entitled, by virtue of his adoption, to take by representation

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[69] Kolb v. Ruhl's Adm'r, 198 S.W.2d 326 (Ky. 1946).

[70] While the precise question as to whether an adoptive child may inherit through as well as from his adoptive parents has not reached the Court of Appeals since the enactment of KRS § 199.520(2), the Court has implied by way of dicta that the rule remains applicable. Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965); Major v. Kammer, 258 S.W.2d 506 (Ky. 1953).

[71] *R. Petrilli*, KENTUCKY FAMILY LAW, § 29.25 (1969).

[72] Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965).

[73] *See* Minary v. Citizens Fidelity Co., 419 S.W.2d 340 (Ky. 1967); Pennington v. Citizens Fidelity Bank, 390 S.W.2d 671 (1965); Edmands v. Tice, 324 S.W.2d 491 (Ky. 1959).

[74] Power v. Hafley, 4 S.W. 683 (1887); Drain v. Violett, 65 Ky. Rep. (2 Bush) 155 (Ky. 1867).

[75] 136 S.W. 133 (Ky. 1911).

the share of the estate to which his foster mother would have been entitled. The Court, while recognizing that an adoptive child was considered the heir at law of his adoptive parents,[76] concluded that the act of adoption was a contractual arrangement and therefore binding only upon the parties thereto. All inheritance laws, the Court pointed out, are based upon the natural ties of blood relationships, whereas the right of an adopted child to inherit is based solely upon contract.

The rule expounded in *Merritt* continued to preclude adoptive children from inheriting from collaterals of their adoptive parents until the General Assembly enacted legislation in 1940[77] which superseded the former adoption statute thereby undercutting the reasoning upon which *Merritt* was based. The precipitating factor which led to the legislative demise of the rule contained in *Merritt* was the Court's holding in *Sanders v. Adams*.[78]

In *Sanders*, the testator devised two tracts of land to his daughter for life, remainder to her children should she have any. In the event she died without children the property was to be divided between the testator's two other daughters who were themselves adequately provided for under another part of the will. The life tenant, being incapable of bearing offspring adopted two minor daughters, who at the life tenant's death claimed the remainder interest as children by virtue of their adoption. The Court, in holding for the life tenant's sisters to the exclusion of her adoptive children stressed the fact that the testator, being a "stranger-to-the-adoption", should not have his property diverted from the natural course of descent without expression of such intent.

It is both interesting and appalling that the Court in *Sanders* cited *Merritt v. Morton*,[79] as controlling in this situation.

> It is our conclusion, in accord with the ruling in the Merritt case, that the fact of Martha Schooler Route's adoption of these two children, while effective to make them her own heirs with the right to inherit from her, was ineffective to extend to the adopted children the right to inherit through her from others who were not parties to the contract of adoption.

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[76] Under the adoption statute then in effect the adoptee became the heir at law of the adopter if the adopter wished to have such a status created. Since the rights of both adopter and adoptee were fixed in the adoption contract it was apparently possible to adopt a person while at the same time withholding from him the right to inherit. The statute, KY. GEN. STAT. ch. 31, § 17 (1878), provided only that the court granting the adoption had the power to make the adoptee the heir at law of the adopter.

[77] KRS § 405.200 (1940).

[78] 128 S.W.2d 223 (Ky. 1939).

[79] *Id.* at 226, 227.

In *Merritt*, the sole issue before the Court was the right of an adoptive child to inherit by the laws of intestate succession through his foster mother. The *Sanders* case, on the other hand, involved a class gift to "children" under a will. In *Merritt* the adoptee was indeed seeking to take through his foster mother. He was claiming a share of her mother's estate by representation as the child of his adoptive mother. No such analogous situation was involved in the *Sanders* case. The remainderman under a private instrument does not take through the life tenant as representative. Rather, the gift to him is complete upon the execution of the will, trust or deed. Thus, in *Sanders* the only question for the Court was whether or not the adoptees should be included within the term "children". As discussed earlier in this paper, it is not the rule of succession upon intestacy nor the statute which creates the status of adoptive children which controls, but the intent of the testator as expressed in the instrument.[80] If no such intent is expressed to either include or exclude the adoptee, in accordance with long standing rules of construction, the Court should place itself in the shoes of the testator[81] and resort to extrinsic evidence to determine whether the testator has some predisposition one way or the other. When this is done, and no dominant intent can be found, the Court should then look to the statutes for the applicable public policy and then after weighing all factors involved attribute an intent to the testator. In *Sanders* the Court ignored these long standing rules of construction and, when no intent was present on the face of the will, turned to a case which was not applicable for the basis of formulating a presumption adverse to the rights of adopted children.

If the Court had wished to deny the claim of the adoptive children it should have followed the procedural steps outlined above. As a result of not adhering to accepted practice the Court of Appeals unfortunately established a pattern for deciding these cases which gives undue weight to the language of statutes and the rules of intestacy with resulting neglect of the testator's predisposition toward the matter.

In an apparent reaction to the result reached by the Court in *Sanders*, the General Assembly enacted KRS § 405.200 which set out in more precise language the legal status of adoptees.[82] The new statute provided in part that an adopted child was to be "considered

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[80] *See* notes 29-31 *supra*.

[81] ATKINSON, *supra* note 31, at § 146.

[82] "Any child adopted according to this chapter shall be considered for purposes of inheritance and succession and for all other legal consequences the natural legitimate child of the parents adopting it." KRS § 405.200(1) (1940).

for purposes of inheritance and succession and for all other legal consequences the natural legitimate child of the parents adopting it."

The first case decided under the KRS § 405.200 was *Kolb v. Ruhl's Adm'r.*[83] In that case John Ruhl died intestate, his only heirs at law being the children and grandchildren of the deceased's uncles and aunts. In reversing a lower court decision which had denied the claim of an adopted cousin of Ruhl, that she should inherit by representation, the share of her adoptive mother, Chief Justice Rees, writing for the majority, stated that the recently adopted statute "obviously was enacted to change the existing law as construed by this Court." The Court went on to say that under the statute an adopted child could not inherit through as well as from his adoptive parents.

The enactment of the 1940 statute had no immediate direct effect upon the rights of adoptees as beneficiaries under class gifts. In the two cases which reached the Court within the first thirteen years after its adoption it was held that the statute was inapplicable in that the proper statute to construe in cases involving class gifts was the statute in effect at the time of the adoption.[84] This rule was later reversed in the case of *Major v. Kammer*[85] so that the statute in force, at the termination of the intermediate estate, is construed to ascertain class membership under generic terms.

Since the *Kammer* decision the Court has determined on the basis of statutory language, both prior and subsequent to the 1956 amended statute, that adoptive children are presumed to be included under certain designations in class gifts unless a contrary intent appears in the instrument.[86]

While the present presumption operates to the advantage of adopted children its application is not fundamentally sound. In effect the Court is now employing the same erroneous reasoning it relied upon in the *Sanders* case but reaching a different result. While the correctness of the result itself cannot be argued, the Court has continued to place too much emphasis upon the language of the statute and its effect upon intestacy.

Under the system of patchwork presumptions now employed, the Court compares the terminology employed in the instrument to designate the class with the language contained in the statute. If the generic term in the instrument seems to fall within the bounds

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[83] 198 S.W.2d 326 (Ky. 1946).

[84] Copeland v. State Bank & Trust Co., 188 S.W.2d 1017 (Ky. 1945); Eversole v. Kentucky River Coal Corp., 182 S.W.2d 392 (Ky. 1944).

[85] 258 S.W.2d 506 (Ky. 1953).

[86] Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965); Isaccs v. Manning, 227 S.W.2d 418 (Ky. 1950).

of statutory language or policy, the adoptee is deemed to be included within the term and the presumption in favor of including adoptees is thereby expanded piecemeal. Unfortunately, this method of interpretation is not sound, as the draftsman is required to second guess what the Court will do when a slightly different term appears in an instrument. Thus, the adoptee's rights to take are not fully guaranteed nor are the probable expectations of testators.

In the recent case of *Heller v. Chapman*[87] the Court of Appeals held that the terms "begotten by and born unto him" contained in a will evidenced an intent on the part of the testator not to include an adopted child. While the result may or may not have been correct, it certainly could not easily have been predicted by an observer who had scrutinized other recent opinions of the Court on this subject. In past decisions the Court of Appeals has sought inspiration in the definition of terminology from the literal wording of the statute and its effect upon intestate succession with resulting neglect to the testator's intent as inferred from the instrument. Thus *Heller* ignores KRS § 199.520(2) which provides that adoptive children shall be considered the same as if born of the bodies of their adoptive parents.

In view of the Court's inconsistent approach to the problem as well as the lack of predictability in its decisions, a change in judicial method would seem to be in order. It is well recognized that these problems arise for the most part because transferors and their attorneys fail to take them into account when the instrument is being drafted. Thus, sound rules of construction are imperative so as to assist rather than obstruct the draftsman. It is submitted that in light of the necessity to aid the draftsman and implement the strong social policy which seeks to effectuate a complete transplantation of the adoptive child within his new family, the Court should seriously consider abandoning its present piecemeal approach in favor of a sound presumption which would embrace adoptive children within all class designations unless a contrary intent is expressly stated in the instrument. Such a presumption would be invaluable from the standpoint of the draftsman in that the construction which would ultimately be given the instrument would be known at the date of the document's execution. In addition, the aforementioned social policy would be furthered and such a rule of construction would also seem in step with the probable inclinations of the average testator, had he considered the possibility of an adoption, especially in view of present social conditions and needs.

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[87] 452 S.W.2d 615 (Ky. 1970).

Hopefully when the question again comes before the Court, serious consideration will be given to the approach outlined above. If, however, the Court continues to ignore the need for immediate reform, the General Assembly should respond by enacting appropriate legislation.[88]

V. RIGHTS OF ADULT ADOPTEES

Although, as previously discussed, the adoption processes are historically, and perhaps validly, geared toward the effective integration of a minor adoptee into a new family unit, adult adoptions have sought recognition under the same statutory and common law criteria. However, the advent of the adult adoption did not automatically warrant an immediate and comfortable niche in the existing rules and regulations. Three general areas seemed to have generated most of the difficulties in this area.

The first problem encountered was the lack of statutory directives authorizing adult adoptions and the ensuing confusion among the various courts attempting some rational solution.[89] Another difficult question was presented once the adult's adoption was approved, namely, his inheritance rights, both from and through his adoptive parents.[90] But his adoption and later allowance as an heir generated still a third problem; his age as a determinative factor in closing out the class of beneficiaries taking under a given document.[91] Although ancillary difficulties have also arisen, the scope of the present discussion will be limited to an analysis of these major problems and their various judicial solutions.

Adult adoptions encompass a wide spectrum of motives, yet legislatures have done little to provide regulatory measures that reflect and control these motivations. Inasmuch as adoption is a legislative creation, the effective adult adoption must therefore depend, for the most part, on the local statutes designed for the minor adoptee.

Initial legislative provisions couched their intended meaning in generic terms such as "children"[92] without suitable definition.[93] Their

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[88] See proposed statute in appendix to this note.

[89] *See generally*, Annot., 21 A.L.R.3d 1012 (1970).

[90] *Id.*

[91] *Id.*

[92] MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 388 (3d ed. 1961) defined the term "child" to include a "young person of either sex esp. between infancy and youth," and also "a son or a daughter: a male or female descendant in the first degree." Although a legislature might intend only the former meaning, a statute speaking only in terms of adoption of "children" is equivocal in the absence of some additional explanation or of some mandatory provision which would seem absurd if applied to adult adoptions. But since the prospective adoptee is not the

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main import, of course, seemed to be that only minors were intended. But in 1871,[94] a revision of the Massachusetts law permitted adult adoptions as well. Although Vermont had such a provision as early as 1873,[95] the Massachusetts revision should be noted, for at its base was an attempt to resolve the obvious difficulties of poor choices of description, such as "children".[96] In spite of the early initiative shown by Massachusetts and Vermont, other states were slow to follow with like legislation. By 1952, only 34 states permitted adult adoptions[97] and in 1958 only three additional jurisdictions were added to these ranks.[98] Today 43 states[99] and the District of Columbia[100] either specifically allow such action or impliedly permit the same through

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adopter's "child" (in terms of relationship) until after the adoption has taken place, it is logically arguable that a legislature intends only the first definition (based on age restriction when it refers to adoption) "of a child" rather than "as a child."

[93] In Alabama, for example, the question of interpretation has produced recurring problems for some 80 years. *See Doby v. Carroll*, 147 So.2d 803 (Ala. 1962), noted in 15 ALA. L. REV. 545 (1963).

[94] MASS. GEN. LAWS 1836-1953, ch. 324, at 752 (1954). For a discussion of the Massachusetts law and others enacted before 1876, *see* W. WHITMORE, THE LAW OF ADOPTION IN THE UNITED STATES, AND ESPECIALLY MASSACHUSETTS (1876). MASS. ACTS 1871, ch. 310, § 6, at 654, contained the proviso that: "A person of adult age may be adopted in like manner upon his own consent, without other consent or notice."

[95] VT. ACTS No. 50, § 1, at 42-43 (1873).

[96] WHITMORE, *supra* note 94, at 74.

[97] *See* note, 38 VA. L. REV. 544, 552-53 (1952). One additional state permitted adult adoption in limited circumstances. *Id.* at 553. Because of the previously discussed equivocal language of some of the statutes, it is difficult to make a clear head count of the positions of the states at any given date, though this is becoming less of a problem. In 1935, about 30 states seemed to permit adoption of adults. 4 C. VERNIER, AMERICAN FAMILY LAW 284 (1936).

[98] *See* note, 1958 WASH. U.L.Q. 97, 106-10.

[99] ALASKA STAT. § 20.10.140 (1962); ARK. STAT. ANN. § 56-121 (Supp. 1967); CAL. CIV. CODE § 227p (West 1954); COLO. REV. STAT. ANN. § 1-1-4 (1963); CONN. GEN. STAT. ANN. § 45-67 (Supp. 1968); DEL. CODE ANN. tit. 13, § 951-56 (1953); FLA. STAT. ANN. § 63.231 to -.281 (Supp. 1968); GA. CODE ANN. § 74-420 (Supp. 1967); IDAHO CODE ANN. § 16-1501 (Supp. 1967); ILL. ANN. STAT. ch. 4, § 9.1-3 (Smith-Hurd 1966); IND. ANN. STAT. § 3-124 (Repl. Vol. 1968); IOWA CODE ANN. § 600.1 (Supp. 1968); KAN. STAT. ANN. § 59-2101 (1964); KY. REV. STAT. § 405.390 (1966); LA. REV. STAT. ANN. § 9.461 (1965); ME. REV. STAT. ANN. tit. 19, § 531 (Supp. 1968); MD. ANN. CODE art. 16 § 71 (Repl. Vol. 1966); MASS. ANN. LAWS Ch. 210, § 1 (Supp. 1967); MINN. STAT. ANN. § 259.22 (1959); MISS. CODE ANN. § 1269-02 (Recomp. Vol. 1956); MO. ANN. STAT. § 453.010 (1952); MONT. REV. CODES ANN. § 61-139, -140 (1962); NEV. REV. STAT. § 127.190 (1967); N.H. REV. STAT. ANN. § 461:9 (1968); N.J. STAT. ANN. § 2A:22-1 to -3 (1952); N.M. STAT. ANN. § 22-2-13 (1953); N.Y. DOM. REL. LAW § 109-111 (McKinney 1964); N.C. GEN. STAT. § 48-36 (Supp. 1967); N.D. CENT. CODE § 14-11-01 (1960); OKLA. STAT. ANN. tit. 10, § 60.21 (1966); ORE. REV. STAT. § 109-329 (1967); PA. STAT. ANN. tit. 1, § 1(d), 2.1 (1963); R.I. GEN. LAWS ANN. § 15-7-4 (1956); S.C. CODE ANN. § 10-2587.18 (Supp. 1967); TENN. CODE ANN. § 36-138 (Supp. 1968); TEX. REV. CIV. STAT. ANN. art. 46b-1 (1959); UTAH CODE ANN. § 67-30-1 (Supp. 1967); VT. STAT. ANN. tit. 15, § 431 (1958); VA. CODE ANN. § 63.1-222 (1968); WASH. REV. CODE ANN. § 26.32.020 (1961); W. VA. CODE ANN. § 48-4-7 (1966); WIS. STAT. ANN. § 322.01 (1958); WYO. STAT. ANN. § 1-726 (1957).

[100] D.C. CODE ANN. § 16-301, 303, 304 (1967).

broadly phrased statutes. While three of these jurisdictions permit adult adoption only in restrictive circumstances,[101] the seven which do not permit such action are characterized not by proscriptive language, but merely by explicit provisions for minors alone.[102] In addition, the Uniform Adoption Act, specifically includes a provision for adult adoption.[103]

The procedural formalities requisite in the adult adoption are much less rigid than those for minors. Usually the investigation of the adopter's home[104] and the requirement that the adoptee live for a period of time with the adopter are waived.[105] The consent of the adoptee's natural parents is no longer in issue[106] and the confidentiality

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[101] Idaho provides for adoption of adults only in cases where such adoption did not occur during the minority of such adopted person by reason of inadvertence, mistake or neglect and the person adopting has sustained the relation of parent to such adopted person for a continuing period of more than fifteen years. IDAHO CODE ANN. § 16-1501 (Supp. 1967). Virginia permits adoption of an adult if: (1) the adopter is the adoptee's stepparent and has stood in loco parentis for at least one year; or (2) the adoptee is a niece or nephew of the adopter, has no living parents, and has lived in the adopter's home at least one year; or (3) the adoptee resided in the home of the adopter for at least five years before reaching age twenty-one. VA. CODE ANN. § 63.1-222 (Repl. Vol. 1968). New Mexico provides only for adoption of a childless, unmarried adult who is twenty years younger than the adopter. N.M. STAT. ANN. § 22-2-13 (1963).

Until 1967 Utah provided that an adult could not be adopted unless both his parents were dead. This was amended to permit adoption of an adult. UTAH CODE ANN. § 78-30-1 (Supp. 1967).

[102] ALA. CODE tit. 27, § 1-9 (Supp. 1967); ARIZ. REV. STAT. ANN. § 8-101 to -110 (Supp. 1967); HAWAII REV. LAWS § 331-1 to -16 (1955); MICH. STAT. ANN. § 27.3178(541) to (554) (Supp. 1968); NEB. REV. STAT. § 43-101 to 116 (Supp. 1967); OHIO REV. CODE ANN. § 3107.01 to .14 (Supp. 1967); S.D. CODE SEC. 14.0401 to .0408 (Supp. 1969).

[103] Section 18 of the UNIFORM ADOPTION ACT provides: "An adult person may be adopted by any other adult person [at least ten years older than the person adopted] with the consent of the person to be adopted or his guardian, and with the consent of the spouse, if any, of a sole adoptive parent, filed in writing with the court."

As to the criteria for granting such an adoption, the section adds that: "After a hearing on the petition and after such investigation as the court deems advisable, if the court finds that it is to the best interests of the persons involved, a decree of adoption may be entered. . ." Under the Act, adoption of an adult produces the same civil effects between adopter and adoptee as does the adoption of a minor. Many of the procedural requirements for effecting adoption of a minor are suspended, however, if the adoptee is an adult. Although the UNIFORM ADOPTION ACT has been enacted by only two states, it unquestionably has had a significant impact on the comparable statutory provisions in many other states.

[104] Most frequently the statutes either dispense with an investigation or provide that it will be discretionary with the court. But see VT. STAT. ANN. tit. 15, § 439 (1958).

[105] This requirement still remains for some or all adult adoptions in a few states, including Illinois, Pennsylvania, and Virginia. For a judicial discussion of what amounts to such a "residing with" see In re Adoption of Russell, 85 A.2d 878, 881-83 (Pa. Super. 1952).

[106] The need for parental consent has not been totally eliminated. *See, e.g.*, FLA. STAT. ANN. § 63.261 (Supp. 1968); ILL. ANN. STAT. Ch. 4 § 9.1-8 (Smith-Hurd Supp. 1967). But in the largest group of statutes permitting adult adoption, only the consent of the adoptee and perhaps the adopter's spouse is required. At

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of the proceedings is naturally de-emphasized.[107] Decrees are normally obtained after a single hearing[108] instead of the usual six months wait required for the adoption of the minor child.[109]

However, the adult adoptive processes, even though they eventually gained accepted procedural norms, soon clashed with the law of future interests.[110] The "rules of convenience";[111] evolved patterns of property disposition, crystallized long before the adoption laws and were attuned without regard for adult adoption participation in class gifts.[112] For accepting the adult's status as an adoptee, the courts

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least one state permits consent to be given by the guardian of the proposed adoptee who is incompetent. *See* WYO. STAT. ANN. § 1-726 (1957). Usually the statutory requirements as to who must be given notice are the same as those for consent.

[107] Some of the statutes leave it unclear whether confidentiality requirements for minor adoptions apply to adult adoptions. The use of "child" in such provisions again can be the source of the confusion. In some jurisdictions, however, confidentiality provisions clearly differ according to the adoptee's age at the time of adoption. *See, e.g.*, LA. REV. STAT. ANN. § 9:461 (1965).

[108] In Louisiana the adult adoption is accomplished by a notarial act signed by the adopter and adopted party. LA. REV. STAT. ANN. § 9:461 (1965); Wadlington, *Adoption of Adults in Louisiana*, 40 TUL. L. REV. 1, 6-10 (1965). Nevada requires only a written agreement which is approved by the district court in the county where either the adopter or adoptee resided. NEV. REV. STAT. § 127.190 (1965). In Connecticut such an adoption is effected by a written agreement approved by the court of probate after a judicial hearing. CONN. GEN. STAT. ANN. § 45-47 (Supp. 1968).

[109] A good illustration of this contrast is seen in the UNIFORM ADOPTION ACT. In the case of adoption of a minor, § 11 specifically requires both an interlocutory and a final decree, with a suggested time lapse of six months between the granting of the former and the application of the latter. For adult adoptions, § 18 replaces this requirement with a single hearing.

[110] *See generally* SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS, (2d ed. 1966). An excellent, brief summary of the rules was stated by Astbury, J., in *In Re Charteres*, 1 Cr. 466, 471 (1927) as follows:

The rule may be divided into three heads, first, if there is an immediate gift in the will to A's children the rule lays down that only those children in existence at the testator's death shall take, although his intention was obviously different. By way of exception to this first head, if there are no children of A in existence at the testator's death then the rule of convenience ceases to operate, and all subsequently born children take in accordance with the testator's intention. The second head of the rule may be stated as follows: If the gift is in futuro, as for instance to A for life with remainder to B's children, the rule provides that only those children of B shall take who come into existence before A's death. Here again there is an exception that if there are no children of B in esse before A's death, the rule ceases to operate, and all subsequently born children take. The third head may be stated as follows: Where there is a gift to A for life and after his death to B's children who attain twenty-one, then if at A's death there are children of B who have attained twenty-one or the representatives of such children, the rule applies and the class closes. If at A's death there are only infant children of B who subsequently attain twenty-one then again the class closes when the first child so attains that age; and in all cases the rule is excluded if there is an express intention of the testator to the contrary.

[111] *See generally*, Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership*, 51 HARV. L. REV. 254 (1937).

[112] Note, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922). The first English statute on adoption was enacted in 1926. ADOPTION OF CHILDREN ACT, 16 & 17 Geo. 5, c.29 (1926).

still had to contend with what, if anything, could such an adoptee inherit. It should be noted at the outset that inheritance from the adoptive parent presents no difficulties, regardless of generic description of the devisees or legatees; only where the proposed claim is a gift through the adoptive parents is there a dispute.[113] Interpretive battles centered around the generic terminology used in the various statutes, and decisions accordingly varied with the terminology. The prime areas of dispute centered, on one hand, over the terms "issue", "heir", and "heir at law" and on the other hand, over "child" or "children".[114]

Decisions allowing "heirs", "heir at law" and "issue" to participate in class gifts through their adoptive parents have generally done so on the grounds that one of the purposes of adoption is to make the adoptee eligible to receive such gifts.[115] This rationale is bolstered when one considers that the terms themselves more aptly connote legal relationships than the lay terms of "child" or "children". Since the adoption has legal efficacy, its attendant privileges should also be recognized. The pertinent cases seem to stress that the testator could have easily excluded adoptees with an express provision.[116]

However, a contrary line of reasoning is prevalent. The rationale here is based on the testator's probable intent evidenced by the particular document in question, and on the further assumption that, absent specific inclusive directives, the testamentary scheme did not foresee a stranger in blood.[117]

Interestingly enough, the fact situation in a Mississippi case, *First National Bank of Kansas City v. Sullivan*,[118] lent itself to both rationales. There the testator designated that the trust corpus was to go to his daughter's "heirs of the body," in default of which the corpus was to go to the testators "heirs of law." The court felt that the testator's intention and preference was to exclude an adult adoptee as an "heir

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[113] *Supra*, note 89, at § 14.

[114] *Supra*, note 89, at §§ 8, 9, 14 and 18.

[115] *Supra*, note 89 at § 14. Most cases have recognized such a motive and generally concur that this does not affect the validity of the adoption. Early examples are *Collamore v. Learned*, 50 N.E. 518 (Mass. 1898) and *Sheffield v. Franklin*, 44 So. 373 (Ala. 1907).

[116] *Cf.* Brock v. Dorman, 98 S.W.2d 672 (Mo. 1936); St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685 (Mo. 1934).

[117] Old Colony Trust v. Wood, 74 N.E.2d 141 (Mass. 1947); Nickerson v. Hoover, 115 N.E. 588 (Ind. 1917); Wyeth v. Stone, 11 N.E. 729 (Mass. 1887). The recent decision in Schaefer v. Merchants Nat'l Bank, 160 N.W.2d 318 (Iowa 1968) added that while "heirs" has a general meaning under the statute of descent and distribution, the general intent, as gathered from the instrument, is actually controlling. *Accord*, Mason v. Wood, 117 S.E.2d 661 (Va. 1961). These cases also reflect the presumption that the adult adoptees are excluded unless specifically included.

[118] 394 S.W.2d 273 (Mo. 1965).

of the body" but included the same as one of the testator's "heirs at law."[119]

Further confusion over the adult adoptee's inheritance rights resulted in semantic games with the terms "child" or "children". Courts favoring inclusion for gift purposes contend that the adult is the legal child of the adopted parent, albeit the usual familial setting is absent. They generally accept the adult adoptee for gift distribution unless a contrary intent expressly appears in the document.[120]

However, other courts argue that the contrary intent is present merely by the use of the word "child" maintaining that a testator would use the term only with reference to its lay meaning, not contemplating its effect under a legal fiction.[121]

A. *The New York Rule*

At this juncture, two New York cases should be analyzed; although they are not directly concerned with adult adoption, their resolutions have direct application. Widely used interpretations of the problematic generic terms were announced in *In re Estate of Park*[122] where the New York Court of Appeals stated:

> A testator or settler must know that in the light of New York policy a foster child has exactly the same "legal relation" to the parent as a natural child. In the absence of an explicit purpose stated in the will or a trust instrument to exclude such a child, he must be deemed included, whether the word "heir", "child", "issue" or other generic term expressing the parent-child relationship is used.[123]

The *Park* decision set the stage for the much celebrated controversy of *In re Silberman's Will.*[124] The facts there involved competing claims to several million dollars held in trust. In 1950 the testatrix executed her will, leaving in trust one-half of her residuary estate for the benefit of her "grandchildren" or "lawful children of my said sons,"

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[119] "Our conclusion is that the will bespeaks an intention and preference . . . to distribute the portion of the trust estate . . . to the exclusion of adopted person, if Alice left heirs of her body; but if Alice died without bodily heirs, it was his intention to open up the distribution to the broader and more inclusive class "heirs at law". . . . *Id.* at 283.

[120] Delaney v. First Nat'l Bank, 386 P.2d 711 (N.M. 1963); *In re* Stanford's Estate, 315 P.2d 681 (Calif. 1957).

[121] *In re* Conley's Estate, 218 A.2d 175 (N.J. 1966); *In re* Nicol's Trust 241 N.Y.2d 775 (1963). *Accord, In re* Freeman's Estate, 40 Pa. Super. 31 (1909) where the use of the word "kin" excluded the adult adoptee.

[122] 207 N.E.2d 859 (N.Y. 1965).

[123] *Id.* at 860-61.

[124] 242 N.E.2d 736 (N.Y. 1968).

the class closing when "any of my lawful grandchildren should survive to and attain the age of twenty-one (21) years."[125]

The testatrix was survived by two sons, Marvin and Samuel, and three natural grandchildren: Janet and John, Marvin's children and Alfred, Samuel's child. In 1955 Peter was born to Samuel and his wife Leslie. In 1956, Samuel adopted Douglas and Rita Frates, his wife's children by a previous marriage. Samuel and Leslie were divorced in 1960 and shortly thereafter he married Lois. In 1965, Samuel adopted Allen and Jane Herskovity, children of Lois by her previous marriage.[126]

The Appellate Division, sustaining the trial court, excluded all the adopted children from participation in the trust.[127] Using the test outlined in *Park*, they concluded that the exclusion of the adoptees was explicitly intended by the testatrix through her designation of the class member as "grandchildren." The Court of Appeals rejected this approach by simply stating that "grandchildren," means "children of my children,"[128] thus satisfying the *Park* requisite of any "other generic term expressing the parent-child relationship."[129]

So the court seems to have ruled out all the technical distinctions conjured up to displace the adoptee. However, the New York Court is still applying a mechanical rule, a rule that may prove inapplicable in the adult adoptee situation. For in the adult adoption, where the sole objectives are gift rights, the summary inclusion under the *Silberman* test may violate the testator's real intent.

What seems to be an underlying and as important a basis for the possible exclusion of the adoptees would be the fear of possible consequences of a premature closing of the class. Two questions of first impression[130] should be considered: (1) Should adoptees ever be included in a class where their inclusion may cause the class to prematurely close? (2) If said adoptees are included for gift distribution, must their lives be considered for purposes of class closing as well? The lower court in *Silberman* primarily explored the potential fraud in adopting an adult in order to close the class and cut off later natural-born children. This argument was rejected by the New York Court of Appeals with the following reasoning:

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125 *Id.* at 739.
126 *Id.* at 737.
127 *Id.*
128 *Id.* at 740.
129 *Id.*
130 In the most comprehensive contemporary study of the problems raised by the adopted child's inclusion or exclusion from class gifts, no mention is made of the problem herein considered. *See* Oler, *Construction of Private Instruments Where Adopted Children are Concerned.* 43 MICH. L. REV. 705, 901 (1945).

> The fallacy of this argument is that it assumes that the possibility of an unusual happening of the nature above mentioned automatically converts the aforesaid provision . . . into an expression of an illicit purpose to exclude adopted children. It must be borne in mind that the rule of *Park* is that adopted children are included in the absence of an expression of a specific intent to exclude adopted children. Certainly, the provision . . . for the closing of the class of beneficiaries does not meet that requirement, it does not mention adopted children and it is not by itself expressive of an intent to exclude adopted children. All that can be said for the provision for the closing of the class, and all that has been said by the surrogate is that, if adopted children were permitted to share in the trust . . . [t]he possibility exists that an adoption might exclude natural born children.
>
> The formula for the closing of the class creates an arbitrary standard and inequities are always possible in such case. However, the possibility of an inequity, especially one so remote as that suggested in the opinion of the surrogate, resulting from the provision for the closing of a class of beneficiaries, should not cause such provision to be read as an expression of an illicit purpose to exclude adopted children from such class.[131]

As it turned out, Janet, Marvin's oldest child, closed the class in 1964 when she attained the age of 21; thereby cutting off any possibility that the court's "remote inequity" would operate to unjustly exclude potential class members. Indeed, the court's reasoning is simply supported by normal modes of reality. Since parents of a 21-year-old child seldom have after born children and it is most likely that parents who do adopt will do so during the normal child-bearing period of their marriage, chances are actually slim that adoptees who close the class will cause prejudicial exclusions.

However, the remote inequity is a present fact in the adult adoption since under any gift set up with the usual reference to age of majority, the class will automatically close with the adoption. Whether or not the closing is prejudicial depends upon the facts of each case. The silence of New York and other jurisdictions leaves the question unanswered,[132] but it can be inferred, from the New York court's dwelling upon the "remoteness" of that possibility, that the result would not be contrary to the *Silberman* decision.

B. *The Kentucky Rule*

The interpretation and construction complexities of adult adoptions did not bypass our local forum; for Kentucky has actually become

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131 *In re* Silberman's Will, 242 N.E.2d 736, 740 (N.Y. 1968).

132 Oler, *supra* note 130. (The closing of the class problem in New York was discussed here but only with reference to minor adoptions; no reform has ever extended the discussion to adult adoptions).

the locus for such actions. The Court has generally seemed to indulge in the usual technical distinctions over the generic terms and their varying rationales, and resultant applications have run the gamut. It should be noted at the outset that until 1966, the Kentucky courts had no specific statutory directives in adult adoptions, but merely operated by analogy from the statutes for adoption of minors.[133] However, the statute finally enacted failed to provide sufficiently explicit directions, in gift construction, to actually aid the court's determinations.[134] In light of the amazing results the court has reached over the years in attempting to solve this problem, a detailed analysis of the important decisions will be delineated.

The earliest notable case, *Woods v. Crump*,[135] had to be decided in absence of any specific statutory directives in adult adoptions. The court found itself faced with the construction of a deed leaving property to the grantor's daughter for life, and at daughter's death to the grantor's "heirs and children."[136]

Forty years after the execution of the deed and five years before the death of the life tenant, the life tenant adopted a 32-year-old man. The adoptee's share, if any, under the deed was the problem facing the court. Although the deed spoke of both children and heirs, which could presumably be interpreted to include both blood relatives known to the grantor plus any strangers taking via descent and distribution, the court felt constrained to deny the claim of the adoptee. Utilizing the common law construction of the general statute in force the court concluded that an adoptee may inherit *from* his adoptive parents but not *through* them. The policy motive advanced by the court seemed to be that it would thwart the intention of the grantor to embrace in the term of "heirs" a "stranger in blood"[137] adopted after the instrument's execution.

The *Woods* rule was later concisely restated in *Copeland v. State Bank and Trust Company*,[138] where the Court categorically stated that not only the words "issue" and "heirs," presumed to refer to only blood relatives, but that any person adopted after a testator's death will automatically not be included unless a contrary intent is evidenced

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133 See *supra* note 66 for an example of such statute.
134 KRS § 405.390 provides:
An adult person over twenty-one years of age may be adopted in the same manner as provided by law for adoption of a child and with the same legal effect, except that his consent alone to such adoption shall be required.
135 142 S.W.2d 680 (Ky. 1940).
136 *Id.* at 681.
137 *Id.* at 683.
138 188 S.W.2d 1017 (Ky. 1945).

by the testator. The Kentucky rule at this stage seemed to be soundly geared towards effectuating the testator's intent. However, *Copeland* was soon to be limited. In *Isaacs v. Manning*,[139] the presumption was changed so that "heirs" would include adoptees unless a contrary intent was evidenced by the testator. Then, in *Major v. Kammer*,[140] the Court announced that inheritance *through* as well as *from* adoptive parents was possible, adding that adoptees were to be considered as included within the designation of "heirs" or "heirs at law" unless a contrary intent was shown.

This line of cases set the stage for what is probably one of the more bizzare situations to reach the Court of Appeals. In *Bedinger v. Graybill's Executor and Trustee*[141] the adoption in question was tantamount to a fraud upon the testator. In August, 1914, the will of Luella Graybill set up a trust for her son, Robert, as life tenant, with remainder as follows:

> After the death of my said son, I direct that the trust estate in the hands of the Trustees be paid over and distributed by the Trustees to the heirs at law of my said son, Robert E. Graybill, according to the law of Descent and Distribution in force in Kentucky at the time of his death.[142]

In 1941, some 18 years after the testator's death, Robert, then 58 and his wife, then 45, were without children. Not wanting to see the trust estate by-pass him, Robert hastened to adopt his wife. The judgment recited that she was adopted "as his legal heir at law and child and after this date she shall be deemed to all legal intents and purposes the legal heir of said Robert E. Graybill." In 1955, when Robert died his wife sought the corpus of the trust.

The Court approached the *Graybill* anomaly with a strict eye to the statutory delineations and applicable precedent in an effort to circumvent the claim. However, the claim was to survive, even though surrounded by an aura of what the layman would call "technicality." For under the *Kammer* test, the testator did not express a clear intent to exclude adoptees.[143] Moreover, the applicable statutes mandated that not only should "heir at law" be construed as including adoptees but also that adult adoptions were clearly approved without restriction.[144] In a last ditch effort, the Court even vainly looked to

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[139] 227 S.W.2d 418 (Ky. 1950).
[140] 258 S.W.2d 506 (Ky. 1953).
[141] 302 S.W.2d 594 (Ky. 1957).
[142] *Id.* at 596.
[143] *Id.*
[144] The use of the words "heirs at law" plus the absence of an express exclusion were decisive. 302 S.W.2d 594, 598-99. In addition, the court replied on the early

(Continued on next page)

see if the relationship was possibly incestuous.[145] However, all was to no avail and the wife was awarded the trust corpus.

Any remaining restrictions on adopted adults were lifted by *Edmands v. Tice*[146] which expressly overruled *Copeland.* The Court emphatically stated that adoptees could inherit through as well as from their adoptors and that the term "children" implied no intent to exclude adoptees.

Following a six year pause in such litigation, the Court in *Wilson v. Johnson*[147] was again called upon to construe a wife-adoption situation. Evidently, however, a perusal of its earlier decision caused the Court to re-evaluate its position as possibly being abortive of the basic intent of the trust documents. The Court was now faced with trust provisions that read:

> . . . when the youngest of said children, the mother and the father being dead, shall become twenty-one (21), this trust shall terminate and the principal shall then be divided equally between the children of Leslie living at that time.[148]

Straining to differentiate this situation from *Graybill,* the Court employed a distinction possibly as ingenious as the wife adoption itself. Utilizing the old conceptions that the terms "child" and "heir" inherently should vary in application, the court found that a difference existed between the instant document and *Graybill,* at least technically. However, the Court of Appeals was still troubled with rulings that the generic terms held no significance.[149] Reluctant to overturn such authority, the Court at last found the loophole. They reasoned that an adopted child becomes the natural child of the

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case of Greene v. Fitzpatrick, 295 S.W. 896 (Ky. 1927). The case dealt with a wealthy bachelor's adoption of his married stenographer. Although no problem existed over the class gift through the adoptive parents, the adoption itself was collaterally attacked because it was merely a tool of testamentary disposition. However, the rationale applied was as follows:

> . . . In fact an adoption solely for the purpose of inheriting does not have for its purpose, nor is it followed by, any change in social or domestic relationship of either party to the transaction, but has for its purpose and effect only the bestowal on the adoptee the right of a natural heir to inherit undisposed of property from the adopted ancestor. . . .

Id. at 897.

Another interesting case aptly lends itself to this discussion. Stevens v. Halstead, 181 App. Div. 198, 168 N.Y.S. 142 (N.Y. App. Div. 1917) was in opposition to Greene v. Fitzpatrick in saying that the court would not be induced into approving the relationship of an "adulteress and her aged and infirmed paramour." *Id.* at 144.

[145] 302 S.W.2d at 600. The court rejected this argument because there was no consanguinty of blood between Graybill and his wife.

[146] 324 S.W.2d 491 (Ky. 1959).

[147] 389 S.W.2d 634 (Ky. 1965).

[148] *Id.* at 635.

[149] *Id.* at 635-36.

adopter, and is for all purposes, a child. On the other hand, while an adopted adult becomes the natural child of the adopter, he is still an adult. Accordingly, if a testator uses the word "children," he necessarily means to include only those under the commonly accepted meaning thereof; otherwise he would have used the words "heir" or "issue."[150] The Court then essentially overruled *Edmonds*, but carefully phrased their opinion so as not to affect the rights of minor adoptees.

The Court reinforced their position in *Pennington v. Citizens Fidelity Bank and Trust Company*[151] by staunchly holding to their "child versus heir" distinction.[152] However, the triumph was short-lived, for in *Minary v. Citizen's Fidelity Bank & Trust Company*,[153] the distinguishing factor disappeared. The testrix left the trust to her husband and three sons, terminating upon the death of the last surviving beneficiary, with the distribution as follows:

> . . . [T]he remaining portion . . . shall be distributed to my then surviving heirs, according to the laws of descent and distribution then in force in Kentucky. . . .[154]

A la *Graybill*, one of the sons later adopted his wife and she claimed under the trust at the death of the last beneficiary. The use of the word "heirs" was the same as in *Graybill*, so the *Wilson* doctrine was inapplicable. Instead of trying to evade the issues through more skillful sidestepping, the Court decided to tackle the situation head on. It recognized the adoption as

> . . . an act of subterfuge in effect thwarts the intent of the ancestor whose property is being distributed and cheats the rightful heirs.[155]

At this point, the choice had to be made between carrying out the strict provisions of the applicable statutes[156] and giving effect to the intent of the testator. The court reasoned that the statutes were merely tools under which theoretically, the testators intent would be fulfilled. The Court thereby concluded:

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[150] *Id.* at 636.
[151] 390 S.W.2d 671 (Ky. 1965).
[152] Under this most interesting fact situation a 71-year-old wife adopted her 74 year-old-husband so that he could take under his wife's mother's will which devised the remainder of the estate to "the child or children of my daughter Annie, if any." The court merely stated that the husband was not a child. *Id.* at 672.
[153] 419 S.W.2d 340 (Ky. 1967).
[154] *Id.* at 341.
[155] *Id.* at 343.
[156] KRS § 199.520(2), *supra* note 66; KRS § 405.390, *supra* note 134.

> When one rule of law does violence to another it becomes inevitable that one must then give way to the other. It is of paramount importance that man be permitted to pass on his property at his death to those who represent the natural objects of his bounty. This is ancient and precious right running from the dawn of civilization in an unbroken line down to the present day. Our adoption statutes are humanitarian in nature and of great importance to the welfare of the public. However, these statutes should not be given a construction that does violence to the above rule and to the extent that they violate the rule and prevent one from passing on his property in accord with his wishes, they must give way. Adoption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered should not be permitted and we do not view this as doing any great violence to the intent and purpose of your adoption laws.[157]

It is interesting to note that the strain of reasoning running through the court's decision seems to duplicate the rationale in the earliest such case—*Woods v. Crump*.[158] In both, adult adoptees were not allowed inheritance through their adoptors and from a preexisting instrument where it was apparent that the testator did not intend to include such a "stranger in blood". It also seems ironic that the Kentucky Court of Appeals took almost 30 years to return essentially to the same decision reached in 1940. But at least the court has discarded the traditional strict rule analysis approach in favor of a more flexible and equitable determination of justice for the parties.

The Court has also apparently taken a vanguard step in essentially rewriting the pertinent statute; the legislature specifically directed that the adult adoption would have the same legal effect as would the adoption of a minor child.[159] Yet the Court expressly states that the treatment of the adult should be different than the minor and actually formulates a separate set of criteria to judge the adult's rights.

It seems then, at this point, that the strict analysis of generic terms is past history insofar as adult adoptions are concerned. But we should remember that these generic term disputes were first generated by the distinction between inheritance from and inheritance through the adopted parent. The Court had accordingly tried to ascertain and delineate the inheritance rights under the various wills and trusts with this problem in mind using the statute as primary reference,[160] and until *Minary* it was unable to shake off the statutory

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157 419 S.W.2d at 343-44.

158 *See* n. 135 and accompanying text.

159 *See* KRS § 405.340, *supra* note 134.

160 In each Kentucky case previously discussed, the court looked to the applicable statute to ascertain the status of the generic term in question.

technicalities and relate to more logical and equitable criteria, namely the intent of the testator or grantor.

However, these sundry machinations could have been summarily avoided had the Court stopped to analyze one fundamental principle of law viz: the statutory criteria apply only to intestate succession; in construing a will or a trust, the statutes are inapplicable except insofar as they may express the public policy of the forum or when a partial intestacy results. This is clearly illustrated by the simple fact that when one receives a gift via a will or trust, he receives directly from the donor; the termination of a proceding estate in his adoptive parents serves only to postpone the time of his enjoyment of that gift. Hence, the *from* or *through* distinction with its attendant confusion is immaterial.[161]

Accordingly, in cases construing trusts or wills the court should have first looked to the intent of the testator, relying on the statutes only for policy considerations. Instead, nearly thirty years of unnecessary confusion resulted when the Court missed this self-evident shortcut.

As previously noted, New York seems to be the only jurisdiction to consider the affect of adult adoption on the beneficial class as a separate issue.[162] The Kentucky Court has not done so because it has not been confronted with a class gift, the closing of which depends upon the age of the beneficiaries.[163]

However, Kentucky's strange application of the rules of convenience[164] presents potential problems akin to those confronted by the New York courts. The rules operate to close the class where no specific standard has been set forth in the given document for the closing. Generally, where nothing is specified, the rules operate to close the class at the grantor's or testator's death. Where age limits are prescribed such as "payable at 21," the rules operate to close the class when the first class member reaches that age. Other ancillary rules are many, but are unimportant for purposes of this discussion.[165]

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[161] A clear example of this rule is given in Virginia where the statutes explicitly divide the two, the statutory applications being only for intestate succession. VA. CODE ANNOT. § 63.1-234. Two Virginia cases further point out this difference. In McFadden v. McNorton, 69 S.E.2d 445 (Va. 1952), an adoptee was allowed to take his intestate share as an "heir" from the estate of his adoptor father's sister; but in Merson v. Wood, 117 S.E.2d 661 (Va. 1961), the adopted adult was excluded under a will as an "heir" because despite statutory inclusion, the testator's intent was the determining factor. For a general discussion of this principle see SIMES, *supra* note 110.

[162] In all the Kentucky cases the closing of the class was either dependent upon the donor's death or the termination of the preceding estate.

[163] *See supra,* n. 110, 111.

[164] *Id.*

[165] *Id.*

The important distinction to be noted, however, is that Kentucky does not apply the rules to any situations where family members comprise the class. Instead, Kentucky here closes the class only at the termination of the preceding estate. Thus, in the following hypothetical: *A* to *B* for life, remainder to "*A's* heirs" would be determined at *A's* death; in Kentucky, "A's heirs" would not be determined until the termination of the preceding life estate or at *B's* death. This strange application has generated some of the Kentucky decisions previously discussed, since if *A's* death were the determining factor, later adopted adults would be automatically excluded from class participation. The use of the grantor's or testator's death as the measuring point would accordingly result in an easier construction of his intent since he would have presumably known of the adoption before his death; the "stranger in blood" would no longer be a "stranger" in these cases.

VI. CONCLUSION

The basic premise of construction in adoption cases involving both minors and adults is that different treatment should be accorded intestate succession and inheritance from a document. The statutes presently in force apply only directly to intestate cases where the language may be strictly interpreted. Therefore, when confronted with a will or a trust, the Court should use the statutes only as a measure of public policy, with the donor's intent as the primary decisional base. Kentucky courts, however, have disregarded these fundamental principles in both the minor and adult adoptions.

In early minor adoption cases, the court vigorously applied these intestate statutes as determinative criteria for construction of wills and trusts. The latest cases seem to have qualified this somewhat by looking to the general intent of the testator, but the court has now failed to use the statutes as measures of public policy.

The adult adoption situation is not quite as bad. Although early decisions do evidence heavy reliance on the statutory words, the court has now shifted to the donor's intent and, at the same time, has attempted to decide in accordance with the public policy of the legislation.

However, due to the Court's wanton vacillation in this area, any objective predictability lapses into conjecture. Assuming that the Court could be finally prodded into utilizing the correct construction criteria, there is no guarantee they will continue to do so.

Perhaps the solution lies in specific legislation adapted to the gifts

via instruments, to supplement the present intestate succession laws. Accordingly, a model statute along these lines is provided in the following appendix.

Gerald L. Greene
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APPENDIX

PROPOSED STATUTE
A BILL

To establish in the State of Kentucky regulation of Private Instruments;

Legal Status of Adoptees.

§ 1. The words child, grandchild, issue, heir, heir at law, kin, heir of the body, descendants and all other generic terms used or employed in all private instruments to designate members of a class taking under those instruments shall include any person adopted into the class as well as and to the same extent as any person born into the class.

§ 2. In order to exclude an adopted person from the class participation granted in § 1 an unequivocal statement to that effect must expressly appear on the face of the instrument.

§ 3. Sub-section (1) and (2) shall apply equally to both an adopted adult and adopted minor, except that for the adult a rebuttable presumption to the contrary exists where the adult either was adopted after the death of the person creating the gift or was adopted subsequent to the execution of an irrevocable inter vivos instrument.

§ 4. Where the rebuttable presumption of § 3 arises, the court shall determine the rights of the adult adoptee with reference to the general intent of the person creating the class gift as evidenced by the instrument, its execution, general extrinsic information relative to the creation of the instrument and with reference to the general public policy of Kentucky as set out in this statute.